

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

ATTY.'S DOCKET: FINAROV3A

In re Application of:)	Office of the Deputy
)	Commissioner for Patent
Moshe FINAROV et al.)	Examination Policy
)	
Patent No.: 7,477,405)	Washington, D.C.
)	
Patent Date: January 13, 2009)	Confirmation No. 9921
)	
For: METHOD AND SYSTEM FOR)	March 13, 2009
MEASURING PATTERNED ...		

REQUEST FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT

Honorable Commissioner for Patents
U.S. Patent and Trademark Office
Customer Service Window
Randolph Building, Mail Stop Petitions
401 Dulany Street
Alexandria, VA 22314

Sir:

Pursuant to 37 CFR 1.705(d), reconsideration of the patent term adjustment indicated on the face of the above-identified patent is hereby requested.

In accordance with 37 CFR 1.705(b)(1), submitted herewith is the fee of \$200 as set forth in 37 CFR 1.18(e). If there is any underpayment or any other fee necessary for consideration of this request, please charge same to the deposit account no. 02-4035 of the undersigned.

The following statement of the facts involved is in compliance with 37 CFR 1.705(b)(2). The correct patent

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term adjustment is 928 days. The period of delay under 37 CFR 1.702(b) is 774 days, as properly calculated by the PTO (the period of time from December 1, 2006 (three years after the 371(c) date) to the date of issue on January 13, 2009). However, the PTO failed to take into account the non-overlapping period of delay under 37 CFR 1.702(a).

The period of time from February 1, 2005 - which is 14 months after the Filing or 371(c) date - to May 3, 2006 - on which the first office action was issued - is 456 days (1.702(a)(1)); and the period of time from March 29, 2007 - four months after the reply of November 29, 2006 - until May 25, 2007 - the mailing of the next action - was 57 days. Thus, the total number of days under 1.701(a) is 513 days.

37 CFR 1.703(f) provides that the periods of delay under 1.702 are added together "to the extent that such periods are not overlapping." In *Wyeth v. Dudas*, 580 F.Supp.2d 138, 88 USPQ2d 1538 (D.D.C. Sept. 30, 2008), the U.S. District Court for the District of Columbia held that only periods of actual calendar days overlap between the time periods of delay calculated under 1.702(a) and 1.702(b) are to be considered as overlap within the meaning of 1.703(f). Thus, in this case, the only days of "overlap" are the 57 days of delay under 1.702(a)(2) that occurred

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after December 1, 2006, which was the commencement of the 1.702(b) delay. The 456 days of 1.702(a) delay that occurred prior to the commencement of the 1.702(b) delay must be added to the 774 days of delay under 37 CFR 1.702(b) to determine the total PTO delay, as per the interpretation required by the *Wyeth* court.

Thus, the period of patent term adjustment by the interpretation approved by the court in *Wyeth v. Dudas*, *supra*, is $513 + 774 - 57 = 1230$ days, minus any period attributed to applicant's delay (37 CFR 1.704). The PTO calculated applicant's delay as 302 days. Thus, using the PTO's figures and the court's interpretation, the correct period for patent term adjustment should have been 928 days, i.e., $1230 - 302 = 928$ days. No terminal disclaimer has been filed in this case.

These issues could not have been raised on or before the date of payment of the issue fee as the period of adjustment under 1.702(b) did not become determined until the patent issued. Indeed, the PTO does not consider the effect of the 1.702(b) period until it mails the issue notification. Accordingly, this request for reconsideration of the patent term adjustment is timely under 37 CFR 1.705(d).

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Granting of this request and modifying the patent term adjustment afforded this case to a total of 928 days are therefore earnestly solicited.

Respectfully submitted,

BROWDY AND NEIMARK, P.L.L.C.
Attorneys for Applicant

By: /rlb/
Roger L. Browdy
Registration No. 25,618

RLB:edg

Telephone No.: (202) 628-5197

Facsimile No.: (202) 737-3528

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